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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1718

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, MOLLY BRONSTEIN, and All Other Intervenors in this District Court,
Appellants,

vs.

UNITED AMERICANS FOR PUBLIC SCHOOLS, a Corporation, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a Corporation, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO AFFIRM ON BEHALF OF APPELLEE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, a Corporation

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Pursuant to Rule 16 of the Rules of this Court, the appellee Americans United for Separation of Church and State moves to affirm the judgment of the court below on the grounds that the appeal presents no substantial question, the question upon which review is sought has been definitively answered by the decisions of this Court, and further review by this Court is not necessary.

Question Presented

The question presented on this appeal is whether the District Court erred in summarily granting the motion of the appellee to enjoin the enforcement of California's Tax Credit Law on the ground that it violated the Establishment Clause of the First Amendement to the United States Constitution.

Statute Involved

The California Tax Credit Law, Cal. Stats. 1973, c. 1260, California Revenue and Taxation Code §§17065-17067, is set forth in full in App. B of the Jurisdictional Statement, pp. 7-11.

Statement of the Case

On December 21, 1972 California enacted its Tax Credit Law designed to assist parents in the payment of tuition for their children at nonpublic schools. The law allowed a credit under the State's Personal Income Tax Law not to exceed $125 for each taxable year after December 21, 1972. The credit was scaled so that parents with adjusted gross incomes of $19,000 and over received no tax credit.

Plaintiffs, two corporations and four individuals, brought suit in the United States District Court, for judgment declaring the law unconstitutional under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth, and enjoining its enforcement. A three-judge court was duly convened and the plaintiffs moved for summary judgment. The Court,

finding no constitutional difference between the California statute and the New York tax credit law invalidated in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 93 S. Ct. 2955 (1973), granted the motion and issued the judgment appealed from herein.

Argument

This appeal rather surprisingly does not address itself to the merits of the controversy, namely the constitutionality of the challenged statute. There is hardly a claim in the Jurisdictional Statement that the statute is actually constitutional, but only that it should not have been summarily held unconstitutional. As the Jurisdictional Statement says (at p. 11), "[a]ll that the Franchise Tax Board and intervenors ask for is their right to have the constitutionality of the statute decided on the actual facts, not on suppositions about the nature of the nonpublic schools and their activities." What the appellants complain about in this appeal is the refusal of the District Court to order a full factual trial on the question of the facial unconstitutionality of the challenged law.

The District Court, in granting the appellees' motion for summary judgment, relied upon *Nyquist*. It could also have cited *Grit* v. *Wolman*, 93 S. Ct. 3062 (1973), affirming *Kosydar* v. *Wolman*, 353 F. Supp. 744; and *Seegers* v. *Traigle*, —— F. Supp. —— (U.S.D.C., M. D. La., decided Dec. 27, 1973), both of which invalidated tax credit laws constitutionally indistinguishable from the statutes involved in the present case and in *Nyquist*. In none of these cases was there a factual trial on the merits; in each the final judgment was issued summarily.

In *Nyquist,* reference was made to "the ingenious plans for channelling state aid to sectarian schools that periodically reach this Court." 93 S. Ct. at 2972. During the brief period since 1971, ten of these "plans" involving primary and secondary schools have reached this Court for decision: *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971) (purchase-of-services financed out of horseracing proceeds); *Sanders* v. *Johnson,* 403 U. S. 955 (1971), affirming 319 F. Supp. 421 (purchase of services financed out of general treasury); *Earley* v. *DiCenso,* 403 U. S. 602 (1971) (salary supplements); *Nyquist* (tuition payments for low-income families); *Sloan* v. *Lemon,* 93 S. Ct. 2988 (tuition reimbursements); *Essex* v. *Wolman,* 93 S. Ct. 61 (1973), affirming 342 F. Supp. 399 (tuition grants); *Nyquist* (tax benefits); *Grit* v. *Wolman* (tax credits); *Nyquist* (maintenance and repair grants); *Levitt* v. *Committee for Public Education and Religious Liberty,* 93 S. Ct. 2814 (1973) (mandated services).

In every one of these instances the Court held the plan violative of the Establishment Clause, and with the exception of *DiCenso,* in each case *the determination was made without the benefit of a trial on the facts.*

The point of the matter is that a trial is required only where there are controverted issues of fact whose resolution is necessary for the determination of the legal issue facing the court. At the hearing on the motion for summary judgment in this case, the appellants herein were pressed to specify and identify these issues of facts, but found it difficult to do so. The closest the appellants came to specification and identification is to be found in the following colloquy between Judge Weigel and Mr. Louisell, attorney for the intervening defendants:

Mr. Louisell: * * * Your Honors will note in some of the cases Justice Powell wrote for the Court, in other cases the Chief Justice wrote for the Court, admitted in all candor, if parents are going to have the right to send their children to private schools, whether affiliated with religious organizations or not, the path that the Court has carved out for those parents is a very narrow channel between Scylla & Charybdis, as the Court itself has said, but there is a channel, and there is a channel, I respectfully submit, if you would keep open to a full and fair hearing on the exact questions involved which would call for a denial of the pending motion for summary judgment.

Your Honors will note in how many of these cases the proceeding was simply summary judgment without a chance to show facts.

Judge Weigel: Well, Mr. Louisell, give us the facts that you believe you could prove at a trial which would take you down that narrow passage.

Mr. Louisell: In the complaint there is alleged that about 90 percent of the children in California who are in non-public schools are in Catholic schools. That is not the fact. The fact is that about 45 percent of the non-public schools of California are Catholic schools, only about 45 or 46 percent, and that the number of children in all the non-public schools in California who are in Catholic-related schools probably does not exceed 69 percent, and the exact facts could be demonstrated at trial (Reporter's Transcript. August 28, 1973, pp. 12-13).

• • •

Judge Weigel: I would like to know where your first point takes you. Suppose it is true that only 45 percent of the private schools are Catholic schools, and suppose it is true that of the total student population of the private schools only 69 percent are Catholic. What does that establish?

Mr. Louisell: It establishes this, Your Honor, that in some of these opinions there is language that the real evil of the situation is that this has become a matter of preference for one religious denomination. We maintain that that is not the case, at least in California. We maintain that in California—

Judge Weigel: I suppose your argument might be, just looking at that, if the percentage were 51 percent of the total number of schools, it might be otherwise?

Mr. Louisell: It would be difficult to crystallize, and I think that is one of the dangers in this area, we can get to extreme crystallization and rigidity.

But if we could show the facts, whether it is 45 or 35 or 55, whatever it be, it is not something that the legislature has been induced to do as a preference for the Catholic parents.

Judge Weigel: The next thing, have you finished that thought?

Mr. Louisell: I think so, Your Honor.

Judge Weigel: The next thing that you urge upon us that there ought to be a trial, so that it can be shown, based upon testimony from one or more members of the Council—

Mr. Louisell: Yes, Your Honor.

Judge Weigel: —of private schools, people interested in private schools, they can testify that the private school situation does not promote intolerance for divisiveness.

Mr. Louisell: Or division along religious lines.

Judge Weigel: That is your second point?

Mr. Louisell: That is right. (*Ibid.*, pp. 15-16)

We have set forth this colloquy because it presents more specificity than is to be found in the Jurisdictional Statement. What the appellants assert is that while the complaint alleged that 90% of the pupils in California's nonpublic schools are Catholic a trial would show that the true

figure is only 69%, and that while the complaint asserts that aid to sectarian schools causes religious and political divisiveness, a trial would show that no such consequences ensured from the enactment of the challenged law.

In respect to the first assertion, we suggest that nothing in *Nyquist* (or in any other of the decisions invalidating "plans for channelling state aid to sectarian schools") indicates that the difference between 90% and 69% is of constitutional significance. On the contrary, as we will indicate further below, the Court in *Nyquist* specifically rejected "statistical judgment[s]" in determining the constitutional issue.

Nor does religio-political divisiveness give rise to a triable factual issue. This consequence of state aid to religion was first suggested in *Walz* v. *Tax Commission*, 397 U. S. 690, 695 (1970), was expanded in *Lemon* v. *Kurtzman*, 403 U. S. at 622-624, and further expanded in *Nyquist*, 93 S. Ct. at 2977-78. In no case did the Court predicate its assertion on a trial record showing divisiveness in respect to a specific legislative measure at a particular point in time; in each instance the context clearly shows that the Court was speaking of the probable if not inevitable consequences of such legislation in general.[1] That the Court

1. In his concurring opinion in *McCollum* v. *Board of Education*, 333 U.S. 203, 228 n. 19, Mr. Justice Frankfurter, speaking of the movement for released time for religious education in the public schools, said:

> The divergent views expressed in the briefs submitted here on behalf of religious organizations, as amici curiae, in themselves suggest that the movement has been a divisive and not an irenic influence in the community.

The multiplicity and divergence of briefs *amici curiae* submitted in numerous aid to sectarian schools cases indicate that his observation is no less valid in respect to this type of governmental involvement in religious affairs.

did not intend to exempt income tax credit legislation from this generalization is shown by its reference in *Nyquist* to the predictability of "the pressure for frequent enlargement of the relief" and the consequent "potential for political divisiveness related to religious belief." 93 S. Ct. at 2977.

The only other factual issue asserted in the Jurisdictional Statement to require a plenary trial arises from the relation of the amount of the tax credits to the cost of secular instruction in the religious schools and the amounts expended by the State for such instruction in the public schools. Under the statute the maximum tax credit allowable is $125 per pupil per year, and the defendants submitted affidavits on the motion for summary judgment, and would prove on trial, if one were ordered, "that the educational costs attributable to secular education as prescribed by the State Education Code, exceed $125 per pupil per year." Jurisdictional Statement, p. 7.

The difficulty with this is that the same claim was asserted in *Nyquist*, was fully considered by the Court there and ruled constitutionally irrelevant. The Court said:

> Second, the Majority Leader and President pro tem of the State Senate argues that it is significant that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious schools' total expenses. The New York statute limits reimbursement to 50% of any parents' actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contributions, endowments and the like." On the basis of these two statistics, appellee reasons that the "maximum tuition reimburse-

> ment by the State is thus only 15% of the educational costs in the nonpublic schools." And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." *It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, and it can fare no better here.* Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement." 93 S. Ct. at 2972-73. Footnotes omitted. (Emphasis added.)

While this statement was made in respect to tuition grants, the Court held that there was no constitutional difference between these and tax credits. *Ibid.*, p. 2974. Moreover, the italicized sentence in the above paragraph from *Nyquist* disposes of the contention in the Jurisdictional Statement (p. 12 footnote) that a relationship between costs for public and nonpublic schools is constitutionally irrelevant only where a direct subsidy to sectarian schools is involved but is constitutionally critical where the subsidy is indirect as in the case of tax credits.

Appellants claim that they "should be allowed to show that the language of *Nyquist* invoked by the court below, 'a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education,' is not applicable to the facts here." They do not, however, indicate what facts elicited on a trial would make

that showing. The *Nyquist* decision, and the others cited herein, show that there are no such facts and that a plenary trial would serve no purpose other than delay.

The crux of the matter is that the California statute herein challenged is not constitutionally distinguishable from the New York law invalidated in *Nyquist*.[2] This is hardly surprising; the California statute was enacted before *Nyquist* was decided by this Court. The New York law came to California with the cloak of protection accorded by the decision of the District Court for the Southern District of New York upholding its validity. 350 F. Supp. 655. There was, therefore, no need to fashion another of "the ingenious plans for channelling state aid to sectarian schools that periodically reach this Court." Appellants' efforts in the court below and on this appeal are a *post hoc* attempt to achieve the impossible, namely, distinguish the indistinguishable.[3]

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2. *Cf. Seegers* v. *Traigle, supra*:

> The Collector of Revenue has stated to the court that he has examined the *Nyquist* decision with care, has compared the language and effect of the New York State Tax Credit Law with the Louisiana Tax Credit Law here at issue. With commendable candor, he states that there is no constitutionally significant difference between the New York and Louisiana statutes insofar as their substance and intent are concerned. This is correct; therefore we can neither narrowly distinguish nor subvert *Nyquist*.

Slip opinion, p. 2.

3. Appellants note that one of the judges of the three-judge court died during the pendency of the case, and calls this Court's attention to *Ayrshire Corp.* v. *United States*, 331 U. S. 132 (1947), holding that a judgment of a three-judge court based upon a determination by only two judges is void. Jurisdictional Statement, p. 13, footnote. In that case, however, the judge became ill and did not participate in its determination. 331 U. S. at 134. In the present case Judge Hamlin, before his death, concurred in the result reached by the Court. Jurisdictional Statement, Appendix, p. 4. Unlike *Ayrshire*, there was a determination here by all three judges. A similar situation existed in *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545, 548 (1972).

Conclusion

For the reasons set forth herein the judgment of the District Court should be affirmed.

Respectfully submitted,

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